No. 82-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

R. PULLEY, Warden of the California State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AS AMICUS CURIAE

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The National Council on Crime and Delinquency is a non-profit organization which combines research, public education, and professional assistance to prevent crime and to ensure rational responses to

it. Supported by individual and corporate contributions, income from publications and dues, and foundation and government grants, NCCD is an independent voice seeking to influence policy, to inform opinion, and to shape practice.

NCCD maintains a regular program of research, information, and technical assistance. Currently underway are major studies of parole, probation, jail conditions, juvenile courts, and rape. NCCD published two quarterly journals, Crime and Delinquency and the Journal of Research in Crime and Delinquency, and a bi-weekly newsletter. The organization maintains a 50,000-item library and regularly advises state and local policy-makers and citizen groups on various criminal justice issues.

NCCD also conducts special projects, issues occasional publications and concentrates on currently pressing issues. NCCD

has become the leading repository of empirical analysis of the effect of the death penalty. A special issue on Crime and Delinquency (October 1980) presented some of the most recent research, and the organization recently published an up-to-date review of the literature available on the subject. See S. DIKE, CAPITAL PUNISHMENT IN THE UNITED STATES; A CONSIDERATION OF THE EVIDENCE (1982).

QUESTION OF LAW NOT ADEQUATELY PRESENTED

The National Council on Crime and Delinquency seeks to file the attached brief as Amicus Curiae in support of Respondent because of the important questions involved in the grant of certiorari. The constitutional necessity for proportionality review emerged as a primary factor in this litigation only as a result of the Court of Appeals' decision to grant habeas corpus relief to the Respondent on

that basis. Harris v. Pulley, 692 F.2d 1189, 1196-97 (9th Cir. 1982)(per curiam). Furthermore, the petition for certiorari invites this Court to decide the constitutional necessity for proportionality review in terms of an absolute, per se rule, an approach which the attached brief contends is fundamentally misleading. How this Court decides the questions presented by the Petitioner will govern the future operation of not only California's death-sentencing statute, but those of numerous other states. Consequently, it is essential that this Court consider the intersts of others besides those of the parties to this litigation. The attached brief evaluates the constitutional necessity for proportionality review from such a perspective. It also identifies the basic components of the comparative sentence review process which must be present if that

process is to be capable of providing the safeguards required by Furman v. Georgia.

COMPLIANCE WITH RULE 36.3

Pursuant to Supreme Court Rule 36.3, counsel for the National Council on Crime and Delinquency as Amicus Curiae has attempted to obtain from the parties written consent to the submission of the attached brief. However, during a tele= phone conversation on June 13, 1983, Deputy Attorney General Michael D. Wellington, Counsel for Petitioner, stated that consent to amicus curiae briefs would not be forthcoming. For that reason, the National Council on Crime and Delinquency has submitted this motion.

Respectfully submitted,

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The National Council on
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BRIEF OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AS AMICUS CURIAE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of the National Council on Crime and Delinquency as Amicus Curiae is set forth in its Motion for Leave to File Brief as Amicus Curiae in Support of Respondent.

QUESTIONS PRESENTED

Whether, under California's death-sentencing statute, the Eighth Amendment requires a court of statewide jurisdiction to conduct a "proportionality review"; and, if so, what are the essential features of a constitutionally satisfactory comparative sentence review process.

SUMMARY OF ARGUMENT

Because of the degree of discretion California juries exercise in capital cases, some form of comparative sentence review--what this Court called "proportionality review" in Gregg v. Georgia--is constitutionally necessary under the California statute. Furthermore, although the circumstances of this case do not require the Court to prescribe in detail every facet of a constitutionally satisfactory sentence review, this Court should

identify those essential features necessary to satisfy the constitutional standard of preventing arbitrary, inconsistent, or capricious death sentences.

ARGUMENT

I.

UNLESS A STATE'S DEATH SENTENCING PROCEDURE INCLUDES SATISFACTORY ALTERNATIVE SAFEGUARDS, PROPORTIONALITY REVIEW IS CONSTITUTIONALLY REQUIRED IN DEATH PENALTY CASES

As the first question in its petition for certiorari, the Petitioner asks this Court to decide whether, as a per se rule, the Eighth Amendment always requires an appellate court of statewide jurisdiction to conduct in death penalty cases the type of comparative sentence review sometimes described as "proportionality review." See Proffitt v. Florida, 428 U.S. 242, 259 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality

opinion). Whether the California statute includes any particular procedure or safeguard is not the issue. The real question is whether, in light of all the procedures and safeguards established by the legislature, the statute as a whole is "capable of meeting Furman's constitutional concerns." Id. at 195. Furthermore, even if a given capital-sentencing statute is theoretically capable of preventing arbitrary, inconsistent, or capricious death sentences, as the Eighth Amendment requires, how its safeguards actually function in any particular case always remains open to challenge. Zant v. Stephens, 456 U.S. 410 (1982) (per curiam). See Godfrey v. Georgia, 446 U.S. 420 (1980).

What Furman v. Georgia, 408 U.S. 238 (1972), and this Court's subsequent decisions make clear is that, to be constitutional, a State's death-sentencing proce-

dure must satisfy at least four requirements. First, it must spell out legislatively mandated criteria which reasonably relate to the sentencing decision and which serve to identify those defendants convicted of murder who are eligible for the death penalty. Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (No. 81-89, June 22, 1983). See also, Gregg v. Georgia, supra, 428 U.S. at 192-95 (plurality opinion); id. at 220-23 (White, J., concurring). Second, it must ensure that the sentencing decision is individualized and is based upon adequate information, especially concerning any mitigating circumstances or conditions that might affect the sentencing calculus. See Lockett v. Ohio, 438 U.S. 586, 600-05 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-37 (1977) (per curiam). Third, it must provide adequate procedural

safeguards to ensure that the factual determinations upon which the sentencing decision is based conform to the applicable statutory criteria, Gregg v. Georgia, supra, 428 U.S. at 193-95 (plurality opinion), and are made in reliable manner. Beck v. Alabama, 447 U.S. 625, 637-38, 640-43 (1980); Lockett v. Ohio, supra, 438 U.S. at 601, 604 (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357-62 (1977) (plurality opinion); id. at 363-64 (White, J., concurring). Fourth, it must also include safeguards to minimize the risk of arbitrary or capricious decisions and to ensure evenhanded and consistent sentencing in all capital cases. Zant v. Stephens, supra, 51 U.S.L.W. at 4895, 4898; Gardner v. Florida, supra, 430 U.S. at 361 (plurality opinion); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion); Proffitt v.

Florida, supra, 428 U.S. at 253 (plurality opinion). See also, Furman v. Georgia, supra, 408 U.S. at 398-99 (1972) (Burger, C.J., dissenting). In other words, a constitutional death-sentencing system must genuinely narrow the class of murder defendants eligible for the death penalty on the basis of readily identifiable and verifiable criteria. It must also ensure that the power actually to impose the death penalty in death-eligible cases is exercised in a consistent and evenhanded manner.

By structuring his argument concerning the constitutional necessity for "proportionality review" in terms of a per se rule, the Petitioner ignores important differences in the procedural safeguards that various States have employed to satisfy these four requirements. For example, when enacting the statute upheld

in Jurek, the Texas legislature purported to establish a death-sentencing process which ensured that every defendant convicted of a capital crime who also satisfied the statutorily identified criteria embodied in three sentencing questions would receive a death sentence.[1/] Thus, the Texas statute limits the jury's sentencing function to deciding the factual inquiries

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1/ Under Tex. Code Crim. Proc. Ann. Art. 37.071, if a jury convicts an accused of a capital crime, a further proceeding occurs. Following the introduction of additional evidence and argument, the jury decides the answers to the following three questions:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unresonable in response to the provocation, if any, by the defendant." Id. Art. 37.071(b).

upon which a death sentence is based, particularly with respect to a convicted capital defendant's potential for future violence. If the jury finds that each of the criteria embodied in the three sentencing questions is satisfied, imposition of the death penalty is automatic. Jurek v. Texas, supra, 428 U.S. at 269 (plurality opinion). Thus, the death penalty in Texas purports to be consistently and even-handedly imposed in every case in which the three sentencing questions are satisfied.[2/]

By contrast, the death-sentencing system adopted in Georgia, which this Court

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2/ Whether, as applied, the Texas statute actually achieves these results is a very different question. See Dix, Appellate Review of the Decision to Impose Death, 68 GEO. L. J. 97, 142-161 (1979); Dix, Administration of the Texas Death Prediction of Dangerousness, 55 TEXAS L. REV. 1343 (1977). See Bowers & Pierce, Arbitrariness and Discrimintion Under Post-Furman Capital Statutes, 26 CRIME AND DELINQUENCY 563, 593-601 (October 1980).

sustained in Gregg, gives the sentencing jury much greater discretion. See Zant v. Stephens, supra, 51 U.S.L.W., 4893-94. Although Georgia juries cannot direct imposition of a death sentence unless they make a specific finding that one or more of the aggravating circumstances set forth in the Georgia statute are present, Ga. Code Ann. § 27-2534.1(c), such a finding does not compel imposition of the death penalty. In Georgia, even in cases in which the statutory aggravating circumstances are present, the jury retains discretion not to impose a death sentence for any reason it chooses, or for no reason at all. Ga. Code Ann. § 26-3102. See Zant v. Stephens, supra, 51 U.S.L.W. at 4893; Gregg v. Georgia, supra, 428 U.S. at 203 (plurality opinion). Of course, because the Georgia statute gives this discretion to sentencing juries in capital cases, there is a very

real danger that inconsistent sentences may result. Different defendants, whose background and crimes are factually indistinguishable, may receive very different sentences from their respective juries--a possibility that, theoretically, does not exist under the Texas statute. For this reason, the Georgia legislature provided a further safeguard, "proportionality review":

> In short, Georgia's new sentencing procedures require as a prerequsite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard against a situation comparable to that presented in Furman, the Supreme Court in Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face, these procedures seem to satisfy the concerns of Furman. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

Gregg v. Georgia, supra, 428 U.S. at 198, quoting Furman v. Georgia, 408 U.S at

313 (White, J., concurring). See also, id. at 203.

The Petitioner has suggested that, although "proportionality review" may provide a desirable additional safeguard under the Georgia statute, it is not constitutionally required. Such an argument overlooks the foregoing quotation, which appears in a portion of Justice Stewart's plurality opinion in Gregg that begins as follows: "We now turn to consideration of the constitutionality of Georgia's capital-sentencing procedures. . . . " 428 U.S. at 196 (emphasis added). It is also inconsistent with the Court's very recent decision in Zant v. Stephens, supra, which stressed that both the Gregg decision and the Stephens decision itself rested upon a presumption that Georgia's system of "proportionality review" would serve to vacate death sentences by Georgia

trial courts if they proved to be "excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances." 51 U.S.L.W. at 4898. See id. at 4894. Lastly, the Petitioner's argument also ignores this Court's earlier decisions in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), in both of which the absence of a comparative sentence review procedure by an appellate court of statewide jurisdiction contributed to this Court's determination that the death-sentencing procedures under review were constitutionally deficient. See 428 U.S. at 302-303, 334-336.

In other words, whether comparative sentence review by an appellate court of statewide jurisdiction is a constitutionally necessary component of any State's death-sentencing process depends on what other

safeguards, if any, that process employs to ensure evenhanded and consistent sentencing in capital cases. Thus, asking this Court to decide the constitutional necessity for "proportionality review" in the abstract is unproductive. The important question is whether, given the sentencing procedures and other safeguards employed in capital cases by any particular State, a comparative sentence review is also required in order to ensure evenhanded sentencing and thereby to satisfy the constitutional concerns expressed in Furman v. Georgia.

II.

UNDER CALIFORNIA'S DEATH-SENTENCING STATUTE, INDIVIDUAL JURIES EXERCISE SUBSTANTIAL DISCRETION, MAKING COMPARATIVE SENTENCE REVIEW BY THE STATE SUPREME COURT A CONSTITUTIONAL PREREQUISITE

In order to decide whether an appellate court of statewide jurisdiction must conduct a comparative sentence review in

capital cases under California's death penalty statute, one must determine the degree of sentencing discretion exercised by California juries. If the California statute makes the death penalty automatic in any case in which the jury finds certain statutory criteria to be satisfied, then, as in Texas, "proportionalty review" might not be constitutionally required. If, however, sentencing juries in California exercise a discretion in death penalty cases that exceeds straight-forward fact determination, "proportionality review" or some equivalent appellate safeguard is constitutionally necessary.

A review of the California legislation applicable to Respondent's case indicates that California juries do exercise substantial sentencing discretion. Under the California law, the conviction of a capital offender triggers a two-step sentencing

process. First, the sentencing jury must decide whether certain statutorily defined aggravating criteria are present in the defendant's case. Cal. Penal Code § 190.1 (a) (1977). If the jury finds such "special circumstances" to exist, the defendant becomes death-eligible, and a further sentencing proceeding will occur. Ca. Penal Code §§ 190.1(b), 190.3 (1977). At this proceeding, each side can offer additional evidence of an aggravating or mitigating character and argue the appropriate penalty. The jury then retires to determine the existence of any aggravating or mitigating circumstances and to decide whether the aggravating features of the case or of the defendant's background sufficiently outweigh any mitigating circumstances to justify a death sentence. Significantly, even if these deliberations result in imposition of a death sentence,

California law does not require the jury itself to make any specific findings. Rather the trial judge, who reviews the jury's sentence in connection with an automatic motion to modify the verdict, prepares written findings on the basis of the record which specify the aggravating and mitigating features of the case and give his reasons for finding that the evidence supports the jury's sentence. Cal. Penal Code § 190.4(e). See Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982) (per curiam).

In certain important respects, the California death penalty statute requires sentencing juries to engage in deliberations that resemble those prescribed for sentencing judges under the Florida statute approved in Proffitt v. Florida, supra. Each statute requires the sentencing authority to identify and to balance

against one another the aggravating and mitigating features of the particular case. It is quite likely that this similarity in procedure exists because the Florida and California legislatures both considered the recommendations of the American Law Institute's Model Penal Code when enacting their respective statutes. Section 210.6 of the Model Penal Code, which addresses the sentencing procedure to be employed in capital cases, specifically identifies the appropriate criteria that the sentencing authority should consider and directs the judge or jury to weigh the aggravating and mitigating features found to exist in each case when deciding whether to impose a death sentence. 2 AMERICAN LAW INST., MODEL PENAL CODE AND COMM. 107-110 (1980).

It is also apparent that the task of identifying and weighing against one another the aggravating and mitigating

features of a particular case is most delicate, entailing the exercise of a substantial degree of discretion. See California v. Ramos, ___ U.S. ___, 51 U.S.L.W. 5220, 5225 (No. 81-1893, July 6, 1983); McGautha v. California, 402 U.S. 183, 204-208 (1971). Because of the likelihood that different Florida trial judges would perform this task differently in factually indistinguishable cases, resulting in the imposition of inconsistent sentences in violation of Furman, the Florida Supreme Court has undertaken the responsibility for conducting a form of comparative sentence review in death penalty cases similar to that conducted by the Georgia Supreme Court. See Proffitt v. Florida, supra, 428 U.S. at 250-251 (plurality opinion). Although the Petitioner contends that no such form of comparative sentence review by the Florida Supreme

Court, intended to ensure evenhanded sentencing, is constitutionally necessary, Proffitt is to the contrary. When concluding that, "[o]n its face, the Florida system thus satisfies the constitutional deficiencies identified in Furman," 428 U.S. at 253, Justice Powell catagogued the major features of the Florida statute as follows:

> Under Florida's capital sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

Id. at 253, quoting Gregg v. Georgia, 428 U.S. at 188, quoting Furman v. Georgia, 408 U.S. at 313 (White, J., concurring) (emphasis added). See also Barclay v.

Florida, ___ U.S. ___, 51 U.S.L.W. 5206, 5211 (No. 81-6908, July 6, 1982)(plurality opinion)(decision affirming a Florida death sentence on constitutional grounds is "buttressed" by Florida Supreme Court's practice of conducting a comparative sentence review).

Consequently, if some form of "proportionalty review" by the Florida Supreme Court is a constitutionally essential component of Florida's death sentencing procedure, as the Proffitt plurality opinion indicates, the same constitutional requirement should certainly apply to California's very similar statute. In fact, the argument that some form of comparative sentence review is constitutionally necessary under the California statute becomes even more compelling when one considers two important differences between the Florida and the California procedures.

The first difference concerns the identify of the sentencing authority. Under the California statute, the jury decides whether a convicted capital offender, whose case involved one or more statutorily defined "special circumstances," should receive a death sentence. In Florida, by contrast, the trial judge makes the sentencing decision. As this Court emphasized in Proffitt, trial judges are necessarily more experienced as sentencers than are layperson juries, and, presumably, judges should impose more consistent sentences than juries in capital cases. 428 U.S. at 252 (plurality opinion). Nevertheless, despite this greater assurance of consistent sentencing under the Florida statute, both the Florida Supreme Court and this Court deemed the further safeguard of "proportionality review" also to be necessary. To an even

greater degree, therefore, the same safeguard of comparative sentence review by an appellate court of statewide jurisdiction is constitutionally necessary under the California statute, which delegates the death-sentencing function to inexperienced, lay-person juries.

The second difference between the California and Florida procedures affects the degree of sentencing discretion and the concomitant risk of inconsistent sentences in factually similar cases. Under the Florida statute, the sentencing judge must personally make the specific factual findings upon which a death sentence is based. Fla. Stat. Ann. § 921.141(3). In this way, the Florida procedure enhances the ability of a reviewing court to determine the sufficiency of the evidence supporting the sentence imposed--thus ensuring the factual reliability of the

sentencing process--and to conduct a comparative review of the sentences imposed in similar cases, as the Eighth Amendment requires. See Gregg v. Georgia, supra, 428 U.S. at 195.

By contrast, under the California statute, the sentencing jury is under no such obligation. The specific findings of fact supporting a death sentence are the product, not of the sentencing jury's own deliberations, but of the trial judge's review of the evidence pursuant to the automatic motion to reconsider established by Section 190.4(e) (1977). In the proceedings below, the Respondent argued that the California statute was constitutionally deficient in this respect because it did not require the sentencing jury itself to make the necessary findings. The Court of Appeals divided over that issue, which is not presently before this Court. See

Harris v. Pulley, supra, 692 F.2d at 1195-96, 1204-05. However, that the California statute requires no written findings by the jury itself at the death-sentencing stage underscores the need for additional procedural safeguards in order to vindicate the constitutional requirement of evenhanded sentencing that lies at the core of the Furman decision.

In other words, to satisfy the Eighth Amendment, California must provide the Respondent with a variety of procedural safeguards, including meaningful appellate review. Given the degree of discretion the California statute affords to sentencing juries in the context of weighing aggravating and mitigating factors, see California v. Ramos, supra, 51 U.S.L.W. at 5225, and given the absence of any requirement that the sentencing jury itself make factual findings supporting the imposition of a

death sentence, some form of comparative sentence review by an appellate court of statewide jurisdiction is essential to satisfy this requirement. In no other way can California possibly assure the Respondent that his case, in which a jury chose to impose the death sentence, is distinguishable in some principled way from the many other cases in which other juries imposed sentences of only life imprisonment. See Godfrey v. Georgia, supra, 446 U.S. at 433 (plurality opinion).

III.

THIS COURT SHOULD IDENTIFY AS THE CONSTITUTIONALLY ESSENTIAL FEATURES OF COMPARATIVE SENTENCE REVIEW THE REQUIREMENTS THAT REVIEWING COURTS MUST CONSIDER MITIGATING FACTORS WHEN SELECTING "SIMILAR" CASES AND THAT THE FREQUENCY WITH WHICH FACTUALLY INDISTINGUISHABLE DEFENDANTS RECEIVE LIFE SENTENCES SHOULD GOVERN THE DETERMINATION OF EVENHANDEDNESS

In the event of a ruling that California cannot execute the Respondent without

conducting a constitutionally satisfactory comparative sentence review, the Petitioner invites the Court to prescribe a detailed blueprint of the sentence review process. For two reasons, this Court should accept that invitation with caution.

First, detailing how appellate courts should conduct comparative sentence reviews in capital cases is wholly unnecessary in the present circumstances of this litigation. In particular, if this Court concludes that California law itself requires a comparative sentence review, as the Respondent has argued, an advisory opinion by this Court telling California judges how to perform a state-mandated procedure would obviously be inappropriate.

Second, this Court should also be aware that, by legislation or court rule, more than 20 States have adopted some form of comparative sentence review in capital

cases.[3/] That so many jurisdictions have seen fit to incorporate "proportionality review" into their statutory procedures

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3/ See, e.g., ALA. CODE tit. 134, § 5-53 (b)(3) (Michie Cum. Supp. 1981); CONN. GEN. STAT. ANN. § 53a-466(b)(3) (West Cum. Supp. 1982); DEL. CODE ANN. tit. 11, § 4209 (g)(2)(a) (1979); KY. REV. STAT. ANN. § 532.075(3)(c) (Baldwin Supp. 1980); LA. CODE CRIM. PRO. ANN. art. 905.9 (West Supp. 1980); LA. SUP. CT. R. 28(1)(c); MD. ANN. CODE art. 27, § 414(e)(4) (Supp. 1980); MISS. CODE ANN. § 99-19-105(3)(c) (Supp. 1979); MO. ANN. STAT. § 563014.3(3) (Vernon 1979); MONT. REV. CODE ANN. § 46-18-310(3) (1979); NEB. REV. STAT. § 29-2521.03 (1979) (review of sentences in all cases involving criminal homicide); NEV. REV. STAT. § 177.055(2)(d) (1979); N.H. REV. STAT. ANN. § 630.5(VII)(c) (Supp. 1979); N.M. STAT. ANN. § 31-20A-4 C(4) (Supp. 1980); N.C. GEN. STAT. § 15A-2000(d)(2) (1978); OKLA. STAT. ANN. tit. § 701.12(c) (3) (West Supp. 1980-1981); 18 PA. CONS. STAT. ANN. § 1311(h)(3)(iii) (Purdon Supp. 1980); S.C. CODE § 16-3-25(C)(3) (Supp. 1979); S.D. CODIFIED LAWS 23A-12(3) (1979); TENN. CODE ANN. § 39-2406(c)(4) (Supp. 1980); VA. CODE § 17-110.1(C)(2) (Supp. 1980); WASH. REV. CODE ANN. §10.94. 030(3)(b) (Supp. 1980); WYO. STAT. §6-4-103(d)(iii) (1977); cf. NEB. REV. STAT. § 29-2522(3) (1979) (one factor which judge or judges must consider prior to imposing sentence).

attests to its perceived efficacy as a safeguard against arbitrary or inconsistent death sentences. It also underscores the interest of many other States besides California in the disposition of this case. Of course, as one might expect, the manner in which different courts actually conduct comparative sentence reviews is by no means uniform. In part, these variations in procedure have occurred because of idiosyncracies of state law; in part they are the natural consequences of experimental efforts by different States to develop optimal procedures in the light of their respective caseloads. Thus, any pronouncement by this Court concerning the essential characteristics of a proper sentence review should take into account the existence of these legitimate variations.[4/]

4/ Funded in part by the National Institute of Justice, the National Center

Nevertheless, this Court can substantially facilitate the efforts of different States to develop a constitutionally satisfactory sentence review process by identifying at this time certain basic features that such a process must include. These features are constitutionally required because they are essential to the perform-

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4/ continued

for State Courts is presently engaged in a major project to develop a model proportionality review procedure for use by different States. The basic objectives of the project are to develop practical, workable methods for selecting factually similar cases for comparative purposes and to assist State Supreme Courts in deciding important procedural questions that must be resolved in order to conduct the review process. In addition, empirical studies of how different State Supreme Courts actually administer their death-sentencing procedures are presently underway in at least four States, California, Georgia, Mississippi, and North Carolina. To the extent that the observations and procedures that result from these efforts can inform this Court's pronouncements concerning the proper method of comparative sentence review, prudence dictates avoiding any premature exposition.

ance of the ultimate objective of comparative sentence review: ensuring the even-handed administration of the State's capital-sentencing statute. See Gardner v. Florida, supra, 430 U.S. at 361 (plurality opinion).

More specifically, the purpose of a comparative sentence review is to ensure that no defendant is subjected to capital punishment if other defendants whose cases cannot be meaningfully distinguished generally receive less severe sentence. See Gregg v. Georgia, supra, 428 U.S. at 198 (plurality opinion). Thus, in order to make this determination, the reviewing court must first identify the other cases which are comparable to the death sentence case under review. Of course, determining the specific criteria on the basis of which a reviewing court should select other cases as "similar" can be a complicated question.

More than one method may be appropriate, depending in part upon the particular objectives that prompted the legislature of any given State to adopt capital punish ment.

One method that courts now employ is to select other cases as "similar" on the basis of factual similarity to the death sentence case under review. Another method is to assess the overall culpability or blameworthiness of the defendant in the review case and to select as comparable the cases of other defendants whose offense and records make them equally culpable. See, generally, Baldus, Pulaski, Woodworth, and Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 STAN. L. REV. 1, 22-52 (1980). In either case, however, it is essential that the reviewing court conduct a sufficiently thorough search for other cases

satisfying the comparability criteria being employed so that the ultimate objective of the review process--ensuring evenhanded sentencing--is assured.

Viewed from this perspective, the proper scope of a reviewing court's search for "similar" cases becomes relatively clear. First, the reviewing court must scrutinize other cases arising anywhere within the same State. It should not, as the Louisiana Supreme Court now does, restrict its search only to cases from the same geographic subdivision of the State as the death sentence case under review. See La. S.Ct. R. 28(1)(c). Despite the ruling in Williams v. Maggio, 679 F.2d 381, 394-95 (5th Cir. 1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3920 (No. 82-5868, June 27, 1983), such a geographic restriction on the search for "similar" cases prevents the sentence review process from en-

suring evenhanded sentencing on a statewide basis, which is what Furman requires. Gardner v. Florida, supra, 430 U.S. at 361 (plurality opinion). After all, the Furman prohibition of arbitrary or inconsistent sentences in capital cases arises because of the Eighth Amendment's prohibition of cruel and unusual punishment, which applies to the States themselves. Robinson v. California, 370 U.S. 660, 666-67 (1962). Indeed, that defendants in factually indistinguishable cases received life or death sentences depending solely on the region within a given State in which each was convicted would be a paradigm of the arbitrary and capricious sentencing that Furman condemned. See Bowers and Pierce, supra at 601-09. It is undoubtedly for these reasons that this Court's prior discussions of the comparative sentence

review process have always endorsed the performance of such a review by an appellate court of statewide jurisdiction. Zant v. Stephens, supra, 51 U.S.L.W. at 4894, 4898; Proffitt v. Florida, supra, 428 U.S. at 269-61 (plurality opinion) ("because of its statewide jurisdiction, [the Florida Supreme Court] can assure consistency, fairness, and rationality in the evenhanded operation of the state law"); Gregg v. Georgia, supra, 428 U.S. at 198, 204-06 (plurality opinion).

Second, a constitutionally satisfactory comparative sentence review also requires the reviewing court to extend its search for "similar" cases to all cases that might satisfy the comparability criteria being employed regardless of the sentence imposed. Cf. Zant v. Stephens, supra, 51 U.S.L.W. at 4895 n.19 (citing with approval the Georgia Supreme Court's avowed practice

of considering for comparative purposes both similar life sentence and similar death sentence cases). Apparently, a few state courts limit their search for "similar" cases to other cases which resulted in death sentences. Such a restriction is obviously inconsistent with the notion that what the Eighth Amendment condemns are death sentences in cases that one cannot distinguish on any principled basis from other cases that resulted in life sentences. See Godfrey v. Georgia, supra, 446 U.S. at 433 (plurality opinion); Gregg v. Georgia, supra, 428 U.S. at 198 (plurality opinion).

The notion that evenhanded sentencing is assured so long as the reviewing court identifies at least one other "similar" case that resulted in a death sentence, see, e.g., Goode v. Wainwright, 704 F.2d 593, 603 (11th Cir. 1983), reflects a

profound misconception of the function of a constitutionally satisfactory sentence review. The purpose of a comparative sentence review is not to search for one or more prior cases--"precedents," so to speak--that are comparable to the case under review and that also resulted in a death sentence. The review process can ensure evenhanded, consistent sentencing only if the reviewing court determines the frequency with which other defendants whose cases are "similar" have received life sentences. If most other defendants in "similar" cases are sentenced to death, imposing a death sentence in the case under review does not offend the constitutional requirement of evenhandedness. See Gregg v. Georgia, supra. 428 U.S. at 203 (plurality opinion). On the other hand, if other defendants in comparable cases receive death sentences with insufficient

regularity to implement the policy objectives which prompted the capital sentencing legislation, then the death sentence in the case being reviewed is constitutionally excessive. Furman v. Georgia, supra, 408 U.S. at 311-12 (White, J., concurring). Thus, ignoring "similar" cases which resulted in life sentences or limiting the review process to a "precedent-seeking" exercise is inconsistent with the constitutional function of comparative sentence review.

Third, the criteria that the reviewing court employs for selecting other cases as "similar" must incorporate both aggravating and mitigating features of the death sentence case under review. Clarifying this essential requirement of a constitutionally satisfactory comparative sentence review is important because, on occasion, state courts select other cases as "similar"

solely on the basis of a few aggravating factors. As a consequence, a death sentence imposed upon a defendant whose case includes one or more mitigating factors may be tested for consistency by comparison to the cases of other defendants who lacked any mitigating features and who, almost invariably, received death sentences themselves.

The requirement that mitigating circumstances must receive due consideration in the context of sentence review is essential to ensure evenhanded administration of a capital-sentencing statute. This Court has repeatedly affirmed that sentencing decisions in capital cases must involve individualized consideration of all relevant circumstances, particularly any mitigating features. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, supra, 438 U.S. at 602-605 (plurality opinion). However,

Furman v. Georgia and its progeny also affirm the requirement that the discretion necessary to permit individualized sentencing must be channeled and restricted to ensure consistency and evenhandedness. Thus, those States which employ the comparative sentence review process as a means of achieving evenhandedness must conduct that process in a manner that takes into account all the important factors that sentencing authorities themselves should consider.

To be sure, this requirement may make the process of selecting "similar" cases in a manner that ensures consistency somewhat more extensive. However, the magnitude of the task will vary substantially depending upon the number of prior capital cases in the same State, and, even in States with a large number of potentially "similar" cases, once the reviewing court has established approprate selection proce-

dures, the task is basically mechanical. Furthermore, the use of quantitative methods or computer-assisted selection processes could substantially reduce the effort required and improve the thoroughness and efficacy of the sentence review process. See Baldus, et al., supra at 68-70. Most importantly, however, by conducting comparative sentence reviews in a manner that conforms to the three essential requirements previously described, State supreme courts can substantially minimize the task that discretionary capital-sentencing decisions by individual judges or juries will produce the arbitrary and inconsistent sentencing results that this Court has consistently condemned since the Furman decision.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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